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IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending. . . ." Antiterrorism and Effective Death Penalty Act (AEDPA), 28 § 2244(d)(2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the State's denial of his claims for state postconviction relief, does the defendant have an application pending which tolls the § 2244 statute of limitations?

The State opens its Merits Brief with a statement which is subtly skewed and is the first step in a faulty progression to

an erroneous conclusion. "AEDPA is structured to ensure habeas litigants first exhaust state remedies and then promptly file their federal habeas petition." Resp. Br. at 3. Exhaustion is neither new to the AEDPA nor controversial, but wholly beside the point of whether AEDPA should be tolled while a Petitioner—state or individual—seeks certiorari review. Florida next suggests that the § 2244(d)(2) tolling provision operates to facilitate exhaustion by stopping the clock on the AEDPA limitations period "only until state court remedies are exhausted." Resp. Br. at 3; *see also* Resp. Br. at 6. This position is inconsistent with Congress' failure to adopt the initial proposal of exhaustion as the limitations' trigger, and its choice of AEDPA's tolling provisions. But the State never truly grapples with the critical point on which this matter turns—that the language under dispute does not refer to "state court remedies" or to "exhaustion" but to the *pendency* of a particular species of pleading—an *application* for state postconviction relief.

And here is where the State's leap occurs. The State urges that § 2244(d)(2) identifies, defines and requires a specific forum where the applicant's state postconviction pleading must be under review in order to be considered pending. Its logic neatly but erroneously continues: A state motion for postconviction relief terminates at the decision of the Florida Supreme Court, not because further review cannot be had by this Court, but because the postconviction motion is now "exhausted." It continues: if the postconviction motion is "exhausted," then it is no longer "in continuance." If it is not "in continuance," the AEDPA timeclock once again begins to tick. And, although this Court yet has power to review the decision via certiorari, that process is not a "continuance" of the state proceeding, but some other species of federal review. The result of this construction would be that the petitioner, if he wishes to seek this Court's determination of federal constitutional law, must not only file this new, undefined lawsuit but, since the AEDPA clock is unrelated to

the new lawsuit, of necessity proceed with his federal 28 U.S.C. § 2254 motion.

However, because something is "exhausted" does not mean that the state postconviction motion petition is no longer in existence. Proceedings on that petition may continue to this Court if any federal constitutional issues are challenged.

Since the State misperceives "exhaustion" and its purpose, the equation of "exhaustion" and "in continuance" is fallacious. Exhaustion speaks to the minimum requirements which the petitioner must meet before he is *permitted* to seek federal postconviction review under 28 U.S.C. § 2254. Exhaustion may be the key to the federal courthouse, but it is not a declaration that the State proceeding has terminated.

The Petitioner, after decision by the Florida Supreme Court, is not thus left with only two choices: pursue certiorari or file a motion under 28 U.S.C.§ 2254. He may, and frequently will, pursue both,[1] and he has an absolute right to have this Court's determination of federal issues *before* he enters the United States District Courtroom. Although it is settled that "exhaustion does not include seeking certiorari from a state court denial of post conviction relief." *Fay v. Noia*, 372 U.S. 391, 435-38 (1963), being "exhausted" does not define whether the petition is "pending." And, while the certiorari petition is not required for exhaustion purposes, seeking certiorari from a state court denial of postconviction relief is permitted, and, if filed, continues the State application.

There is nothing in the language of the statute as it is written to suggest the conclusion the State struggles to find and can only reach by restating inaccurately the statute's

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[1] Florida's Legislature recognized the routine nature of the pursuit of this Court's review of postconviction determinations when it provided funding to Registry Counsel to file such petitions seeking certiorari. Fla. Stat. Ann. § 27.711(4)(f),(g).

language.[2] The statute refers neither to exhaustion nor divestiture of this Court's appellate function. Nothing in the language of the statute compels the result the State urges. Rather the contrary is true. By suggesting a non-existent relationship between the concepts of tolling and exhaustion and how they might operate together, the State injects into Mr. Lawrence's simple question an element of subtle irrelevancy, skewing the focus away from the issues which should compel our attention.

Mr. Lawrence's position is succinct. The AEDPA tolling provisions require only that a litigant's state postconviction relief application be *pending*—not that it be pending in state court. The statute addresses the proceeding in question – *an application for state relief*—not the court in which that proceeding may be decided. Where a petitioner disputes the state court's interpretation of U.S. Constitutional law by filing a petition for writ of certiorari before this Court, the petitioner's state postconviction motion is indeed pending, regardless that it is no longer pending in state court. However, the State declines to discuss the one question that defines the difference between its reading and that of Mr. Lawrence—what is this Court deciding when it adjudicates a certiorari petition from the denial of a state postconviction application if it is not the state petition?

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[2] At one point the State presents its revised statutory language in quotes, citing erroneously to the statute, "Section 2244(d)(2) only tolls time when '*a state* prisoner is attempting, *through the proper use of state court procedures, to exhaust state court remedies* . . .' 28 U.S.C. § 2244(d)(2)." Resp. Br. at 14 (emphasis added by Respondent). The State is of course not quoting § 2244(d)(2), instead the quote comes from *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999) (citing *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999)). While this revision doubtless amounts to nothing more than a drafting error, it nonetheless throws into sharp relief the State's consistent inability to squarely face and respond to the statute as it is written.

This Court's power to affect the state court's determination is akin to that of a superior state appellate court over a lower state court:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C.§ 2104. As long as this Court has the power to act upon the state court's judgment in the state postconviction proceeding, that proceeding must be considered to be "pending;" because this Court, in exercising its power of review, can act upon the state court's resolution of the state post-conviction proceedings, those proceedings cannot be said to be complete.

The State quotes liberally from *Carey v. Saffold,* 536 U.S. 214 (2002), in support of its argument that tolling occurs only when the matter is being considered in the state courts. Resp. Br. at 7-8. In particular, the State relies on this Court's statement that the matter is pending "[a]s long as the ordinary state collateral review process is 'in continuance.'" Resp. Br. at 7, quoting *Carey*, 536 U.S. at 219-20. *Carey* cannot be read as the State claims for two reasons. First, in *Carey* this Court was only asked to consider whether, during the gap between the decision by one state court and the request for review of that decision by a higher state court, the original application should be considered "pending;" it held that it should be. *Carey*, 536 U.S. at 219-21. This Court did not purport to resolve the question presented in this case—is the matter still pending when review is sought from this Court. Second, this Court explained that "pending" means while the matter is "in continuance" or "until the completion of" the review process. *Id.* at 219-20. What, then—if anything—

legally undergirds the State's position that this Court's action does not amount to a continuance of the original state court proceeding upon which it operates?

In contrast to Mr. Lawrence's conservative, unremarkable statutory reading, the State urges a novel construction with far-reaching ramifications and inherent practical complications. To accommodate the State's preferred postconviction landscape, this Court would have to create a new federal application, since, according to the State, the application changes its character from a state application for relief to some sort of unspecified federal application.

In addition to its reliance on *Carey,* Florida espouses a dubious characterization of § 2263(b)(2) as a signpost leading us to find "Congress's intent to synchronize the tolling period with the § 2254(b)(1)(a) exhaustion requirement." Resp. Br. at 9. The State's use of § 2263(b)(2) to bolster its position is flawed because it asserts that a statutory drafting *omission*—particular language in one section of a statute that is omitted in another section—is proof of intent to reach a similar result in both sections. The State opines, "While the language used . . . in § 2263(b)(2) is more specific than that in § 2244(d)(2), these sections accomplish the same purpose: tolling the limitations period until state remedies are exhausted as required by § 2254." Resp. Br. at 9-10. Of course, the fact that Congress used different, "more specific" language in § 2263(b) is not evidence that it intended to accomplish the same thing there as it did in § 2244(d)(2). Instead, it is evidence that Congress knew how to limit tolling to proceedings in state court when it wanted to, and therefore should be presumed to know that it was not conveying a desire to impose such a limit in the language selected for § 2244(d)(2). As this Court has reiterated, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in

the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)).

The State, in urging the adoption of its ideal scenario, asks the Court to do what Congress did not do—make certiorari application to this Court difficult, if not, in a practical sense, impossible. The State claims, "Certiorari petitions seeking review of state postconviction decisions are simply not an integral part, nor any part, of the state process." Resp. Br. at 3. By this simple statement, the State expresses its desire that a state court's judgment of federal constitutional issues should be substituted for the judgment of this Court. Had Congress intended to limit the power and jurisdiction of this Court in drafting § 2244(d)(2), it would have done what it did elsewhere in the AEDPA. In § 2244(b)(3)(E) Congress expressly divested this Court of appellate jurisdiction, by way of certiorari petition or appeal, over federal appellate court decisions denying leave to file a second federal habeas corpus petition.[3] By declining to use this or similar language in § 2244(d)(2), Congress signaled its intention to leave the status quo undisturbed. *See Duncan*, 533 U.S. at 174. The status quo, for over two hundred years, has been that this Court has the authority and power to review state court determinations of federal constitutional law. *See* U.S. Const. Art. III, §§ 1, 2; Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385-86; 28 U.S.C. § 1257(c).

As its justification for asking this Court to read the clear statute in light of its policy concerns, the State argues that the plain language reading of the statute:

> (1) Contravenes the AEDPA's mandate to expedite the postconviction process,

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[3] Section 2244(b)(3)(E) provides, "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be subject to a petition for rehearing or for a writ of certiorari."

(2) "[E]ncourages the filing of frivolous certiorari petitions for the sole purpose of tolling the limitations period," Resp. Br. at 3, *see also* Resp. Br, at 17, and

(3) Could result in a "liberal allowance of habeas," a result that "diminishes the significance of state trial court proceedings," and "erodes the quality of state court judging and the morale of state judiciaries," Resp. Br. at 13.

But unless this Court first finds that the statute is unclear, these policy arguments do not come into play. This would mean accepting the premises of Florida's construction argument—which is, in short, that this Court's certiorari review is not a continuation of the state court action but instead a new federal cause of action—unheard of until now. Nonetheless, we will briefly address and rebut each of Florida's complaints.

1. Expeditiousness

How important is speedy resolution of this death case to the State of Florida? Florida itself caused significant delay in Mr. Lawrence's case in two ways—the tardy assignment of counsel, discussed more fully below, and the failure to dismiss an interlocutory appeal in a timely fashion. On April 12, 2004, the district court entered an order staying the proceedings, noting a circuit split on the timeliness issue. Eleventh Circuit precedent notwithstanding, the district court elected to await the resolution of the then-pending certiorari petition in *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003); the Sixth Circuit's holding in *Abela* was contrary to the Eleventh Circuit's decision on this question in *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000). The district court resolved that if this Court denied review in *Abela*, it would dismiss Mr. Lawrence's petition based on *Coates*. About six weeks later, on May 24, 2004, this Court denied review in *Caruso v. Abela*, 541 U.S. 1070, 124 S. Ct. 2388 (2004). Although aware of the denial, the district court could not enter an order dismissing the petition because Florida had lodged its inter-

locutory appeal from the district court's stay order challenging that court's authority to issue a stay. Even after the denial of certiorari in *Abela*, Florida declined to voluntarily dismiss its appeal and the matter lingered on the Eleventh Circuit's docket.[4] Meanwhile, as a consequence, the matter hung unresolved on the District Court docket for 115 days after this Court denied review in *Abela*; the District Court finally entered its order dismissing the petition on September 16, 2004. J.A. 10. This policy concern must be read in the context of the State's actions.

It is true that reading the statute to toll during this Court's review may lengthen the postconviction process on one hand, but if certiorari is granted this Court may address well established as well as newly urged Constitutional issues at a much earlier time and under a different standard. These additional days to apply for certiorari and to receive a ruling thereon do not subvert the AEDPA's essential objectives.

The delay concerns underlying the AEDPA were with much longer periods of time—"from 1973 to 1995 the average time from death sentence to execution was close to ten years and rising." James S. Liebman, *Opting for Real Death Penalty Reform*, 3 Ohio S. L. Rev. 315, 318 (2000). The extension of the process involved here is a comparatively short, discrete, time period—the 90 days permitted for filing a petition for writ of certiorari and the time it takes for this Court to determine whether to grant review. Viewed through a long lens of reality, the question of damage to the State or the integrity of the AEDPA's objectives from reading the statute to allow time for this Court's review of important federal con-

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[4] The State's initial brief in the interlocutory appeal was filed after this Court had denied certiorari in *Abela*. Nonetheless, the State persisted with its appeal, opposing Mr. Lawrence's Motion to Strike its brief. Finally, on September 2, 2004, the Eleventh Circuit dismissed the State's interlocutory appeal.

stitutional issues is a patently irrelevant topic that diverts attention from the real issue.

2. Frivolous Certiorari Petitions[5]

The State's second reason for opposing Mr. Lawrence's interpretation of § 2244(d)(2) is the specter of frivolous certiorari petitions. First, the State's complaint in this regard operates as a plain admission that, without tolling, filing a petition for certiorari will be considerably harder as a practical matter for most litigants. In this case, the difficulties are obvious. After filing his state postconviction petition, Mr. Lawrence had whatever remained of his original 365 days—those days that had not been used to file his state pleading—to obtain counsel and records, investigate, interview witnesses, research, draft and properly file a substantive petition for federal relief. In this case, the time remaining was a single day. In large part this is because Florida's delay in appointing state postconviction counsel and providing him records siphoned off all but the last 10% of Mr. Lawrence's time for preparation and filing. After counsel and records were in place he was left with 37 out of his 365 days.

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[5] The State does not address the situation which occurred in this very case—more restrictive applications of the Constitution under the AEDPA. On certiorari review from the postconviction denial, the petitioner may bring, and this Court may entertain, a broad range of Constitutional violations and, should it deem it appropriate, find that the facts in a particular case establish a violation never before recognized or requiring clarification or extension of existing precedent. The State would have the petitioner begin the § 2254 process immediately. At that stage the petitioner could not argue for new law or newly recognized application of the law to the facts. *See* Diane Courselle, *AEDPA Statute of Limitations: Is It Tolled When the United States Supreme Court is Asked to Review a Judgment From a State Post-Conviction Proceeding?* 53 Cleve. St. L. Rev. 585, 593-95 (2005-06).

3. Deference to state court determinations of the federal constitution.

Third on the list of the State's reasons for opposition is the possibility of a "liberal allowance of habeas," that "diminishes the significance of state trial court proceedings" and "erodes the quality of state court judging and the morale of state judiciaries." Resp. Br. at 13. First, there could never be a liberal allowance of habeas relief without a liberal amount of systemic error in the prosecution and imposition of death sentences. Questions of relief from error and error itself cannot be separated—relief is not possible without error.

In 1991, the Chair of the U.S. Senate Committee on the Judiciary asked Professor James Liebman of the Columbia University School of Law to calculate the frequency of relief in habeas corpus cases. In late 1995, the study was expanded from a simple count of cases and their outcomes to a search for information that might help explain why relief is granted in so many capital cases. *See* James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (June 2000). Writing later, on his own, Professor Liebman reached this conclusion:

> Statistical analysis showing a positive relationship between how frequently a jurisdiction imposes the death penalty for every one hundred homicides and the likelihood that any resulting death verdict will be tainted by serious error, as well as developing literature on the causes of miscarriages and mistakes in particular cases, suggest that following causal explanation: ***At great risk to both reliability and efficiency, and apparently more so than in other parts of the criminal justice system, capital trial and appellate procedures and incentives***

reward the imposition of death verdicts based on factors other than evidence and the law.

Liebman, *Opting for Real Death Penalty Reform*, 3 Ohio S. L. Rev. at 321 (emphasis added) (citing as an example, John Blume & Theodore Eisenberg, *Judicial Policies, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 469 (1999) ("The [per-murder] rate at which states impose [death] sentences strongly correlates with the rate at which [post-sentence] relief was obtained from those sentences.")). Because this suggests that factors such as emotion or community concerns will impact on the imposition of the death sentence, Florida judges doing justice should welcome review of their application of the federal constitution.

The State, in both the tone and substance of its arguments, urges this Court to consider a state court judge's stake in being "right" as a counterbalance to this defendant's desire for a federal review of his claims that may reveal the constitutional error standing between life and execution. How can these interests be equal? Indeed, what interest does any legal actor have that exceeds the duty to the integrity of the result and to the judicial system?

Both the State's failure to address core questions—what is the petition for certiorari if it is not a continuation of the state postconviction proceeding—and its limited comparison of *relevant* statutory provisions—demonstrate the fatal flaws of its position. These failures, along with the arguments set out in Petitioner's initial brief and herein require that relief must be granted.

II. Equity is available to toll the AEDPA statute of limitations when extraordinary circumstances beyond the Petitioner's control exist. Here, there was patent confusion about the calculation of AEDPA's statute of limitations as evidenced by a circuit split; the Florida capital representation system was acknowledged by the Florida Supreme Court to be non-functioning; and, the counsel assignment system failed to assign Mr. Lawrence counsel until virtually all of his limitations' period had expired. These failures occurred in the context of a newly implemented Registry Counsel system designed to solve the counsel crisis, and which included a Legislative promise that Registry Counsel would be competent, would file appropriate motions in a timely fashion, and that counsel's representation would be monitored by Florida. Are these factors sufficient to equitably toll the time for Mr. Lawrence to file his petition?

Although Mr. Lawrence believes that a reasoned reading of § 2244(d)(2) yields the conclusion that his petition is timely, the diverse readings of this section by courts, commentators and litigants are evidence that confusion exists. The good faith reading by Mr. Lawrence's counsel, should it prove to be erroneous, particularly when coupled with Mr. Lawrence's reliance on Florida's promise that it would ensure that he was provided with competent counsel, is the type of extraordinary circumstance which must equitably excuse any limitations' error.

This Court is not being asked to break new ground in the field of equity, merely to consider the rare constellation of factors present which require application of equity. The State does not assist in this analysis. It does not confront the shocking state of Florida's Capital system, the squandering of 90% of Mr. Lawrence's 365 available days while the system struggled to appoint counsel and provide him with records,

the significance of the Florida statutory mandate to assign and monitor Registry counsel, or the limited intelligence level of Mr. Lawrence. It avoids these issues individually, and ignores their collective impact. In equity, the sum is truly worth more than the parts.

The State was incorrect in its assertion that this disorganization in the Florida courts at the time that the Registry was being established did not affect Mr. Lawrence because those problems occurred four years previously. *See* Resp. Br. at 27. The disarray of the state postconviction process, rather than being a stale event occurring four years prior, involved Mr. Lawrence directly. He was found by the Florida Supreme Court to be one of the individuals whose representation was so impacted by the extraordinary delays due to this very disarray, that the time for filing his state postconviction motion was extended. *Amendments to Florida Rules of Criminal Procedure–Capital Postconviction Public Records Production (Time Tolling). In Re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence Has Been Imposed) And Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence)*, 719 So.2d 869, App. B (Fla 1998) ("We toll the time requirements of those rules until October 1, 1998, for all of those defendants set forth in appendix B.").

Mr. Lawrence was keenly affected by the failure of the Florida system to provide him counsel or to expedite the provision of records. Mr. Lawrence, in spite of Florida's promise to timely appoint competent postconviction counsel, *see* Fla. Stat. Ann. §§ 27.710, 27.711(12), failed to receive working counsel until 298 days had run of his limitations' period and that counsel had to wait another 30 days for production of records by the State. This is how the unthinkable delay occurred. Two hundred and two days expired before the trial court appointed the first counsel, hence that gentleman had only 163 days in which to prepare and file the motion. However, 21 days later, he moved to withdraw and a

second counsel was appointed. One hundred forty-two days remained for second counsel before the limitations' period expired. Second counsel accepted the appointment, conditioned upon reaching an agreeable accord with the State regarding payment. Sixty-six days later, a satisfactory contract not being reached, second counsel was permitted to withdraw, and third counsel was appointed. At that point, there were 76 days left in the limitations period. Even after a third counsel was chosen from the state Registry, the production of files and records maintained by various State actors was not expedited. As of January 4, 1999, counsel acknowledged that he had received some records on December 14, 1998, but counsel was still forced to litigate the failure to produce certain other records. By December 14, 1998, when a mere 37 days of these limitations periods remained, counsel had only received some of the tools necessary to prepare the state postconviction petition.[6]

Mr. Lawrence's state postconviction motion was filed 36 days later, after partial records' production—on the 364th day of the limitations periods. This debacle in assigning counsel and the resultant compressed time frame for research, investigation and drafting of a state petition, had a domino effect on the timely filing of a subsequent federal motion. These facts require equitable intervention.

Mr. Lawrence had only 10% of the time that Congress intended for investigation, legal research and drafting of a state motion. Congress permitted 365 days against the presumed backdrop of counsel beginning work on day one. Instead, despite Florida's promise to timely appoint counsel, Mr. Lawrence was left with 37 days. Without ever addressing how its own actions (and inaction) affect the

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[6] Even after the petition was filed, and as late as February, 1999, Mr. Lawrence continued to litigate records' production issues and receive additional records from the State.

equities, the consequence that the State urges is stark indeed: the door to the federal courthouse is forever closed to Mr. Lawrence.

Not only were Florida's delays in the assignment of counsel and the provision of documents egregious, the impact on Mr. Lawrence was multiplied by the malfunctioning of Florida's Registry. Unique to Florida's statutory plan is its promise to death row inmates that the State will promptly appoint competent counsel and follow those appointments by monitoring appointed counsel's actions. *See* Fla. Stat. Ann. §§ 27.710, 27.711(12). In its presentation before this Court the State treats this explicit statutory promise as surplusage. It fails to explain what monitoring means, how it functions, why it was not evident in Mr. Lawrence's case or why, conversely, Florida should be excused from its promise.

Rather than addressing these issues of incalculable importance, the State, citing decisions which do not raise this State "promise" issue, characterizes Mr. Lawrence's failure to file his federal motion while this Court was considering his certiorari petition as "ignorance," because, *inter alia*, the law was "well settled." Resp. Br. at 19. The State also argues that attorney error is not support for equitable excuse because an attorney is an agent for the client, *see* Resp. Br. at 23-25, and that since there is no constitutional right to postconviction counsel, the actions of the counsel are immune from inquiry, *see* Resp. Br. at 25. None of the State's arguments address Mr. Lawrence's unique factual posture.

The State asserts that there is no proof that Mr. Lawrence relied upon counsel's error regarding the AEDPA limitations' tolling calculations in the Eleventh Circuit. *See* Resp. Br. at 25, n.14. The face of the Record reveals that Mr. Lawrence was given incorrect advice and relied upon that advice to his detriment. The typewritten Motion to Vacate presented to the United States District Court establishes that both Mr. Lawrence and his counsel were calculating the time for his

federal § 2254 filing based upon the time when this Court made a decision on his certiorari petition. He relied on counsel not only for advice but even to prepare the typewritten document. In response to Question 13 on the form provided by the District Court for filing of a Motion to Vacate under Title 28 U.S.C. § 2254, Mr. Lawrence answered in the affirmative, indicating that he had filed an "other federal pleading regarding the validity of your state court confinement, in any federal court?" He explained this answer:

> U.S. SUPREME COURT CERTIORARI, INFO PENDING.
>
> Petitioner has a pending Petition for Writ of Certiorari in the U.S. Supreme Court. It has been calculated that his time for filing federal habeas corpus would expire one day after denial of certiorari. Thus, he would have insufficient time to file for federal habeas corpus. Petitioner requests ruling herein be deferred until such time as a U.S. Certiorar [sic] is determined.

J.A. 29-30. Mr. Lawrence relied on a State actor who mis-advised him.

In this case, the State argues that relief from this error has no place in equity and, consequently, that Mr. Lawrence should suffer the consequences. However, the State did not hesitate to advocate that such error *should be excused* when it was a Florida Assistant Attorney general who made the identical error and the worst case scenario to the State would have been litigating the merits of another petitioner's claim, not death. *See Day v. McDonough*, 126 S. Ct. 1675 (2006). Although *Day* was decided on the issue of whether a United States District Court could *sua sponte* notice a timeliness error, the State argued, alternatively, that its mistake should be excused. The State did not there characterize its alternative argument as "equitable," yet it effectively was relieved from its error.

In this case, the State characterizes the mistake as "ignorance of the law," and asserts that the patent state of the law establishes the egregiousness of the error. Yet, when addressing what it considered a reasonable accommodation to the State's identical error, made in the identical time frame, the State argued for excuse.[7]

Mr. Lawrence wants no more nor less than the State proposed in *Day* as a workable rule.

> In lieu of an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver, the State reads the statutes, Rules, and decisions in point to permit the "exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition." . . . Employing that 'intermediary approach' in this particular case [*Day*], the State argues, the petition should not be deemed timely simply because a government attorney calculated the days in between petitions incorrectly.

Day, 126 S. Ct. at 1683. Of course, even the characterization as a "calculation" error was misleading. It was not the State's counsel's arithmetic which was erroneous, the error was the application of the law.[8] Nonetheless, the State argues that, to

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[7] The State argued not only the power of the court issue but also that its assertion that Day's petition was timely, which the Magistrate Judge characterized as patently erroneous, should be excused. *Id.* at 1683. The Assistant Attorney General in *Day* excepted from the limitations period the time when this Court was considering certiorari from denial of postconviction relief, and admitted on the face of the pleadings that Day's petition was timely. *Day*, 126 S. Ct. at 1681.

[8] This Court's decision in *Day*, however, does not undermine Mr. Lawrence's statutory construction argument in Issue I, *supra*. This Court made clear in *Day* that it was not deciding whether the State's interpretation of the tolling provision – that tolling continues while this

the extent that equity might apply to the AEDPA, Mr. Lawrence's equitable concerns are insufficient. *See* Resp. Br. at 20.

Mistakes happen. Some of these mistakes result in consequences and others do not. In *Day*, although the facts were identical, the State argued alternative outcomes, the result of each favorable to it. The State's position on error should be accepted by the Court. Mr. Lawrence's consequence for making the same mistake for which the State's counsel was excused should not be a bar to his petition for relief.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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Court considers a certiorari petition from a state postconviction proceeding—was actually erroneous. *See Day*, 126 S. Ct. at 1680 n.2 ("The instant opinion, we emphasize, addresses only the authority of the District Court to raise AEDPA's time bar, not the correctness of its decision that the limitations period had run.").